N & N Consultants Sdn Bhd v MBf Property Services Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–24–754 OF 1997 AND NO MT1–24–755 OF 1997
SURIYADI J
30 MAY 2006

Contract — Construction of terms of contract — Sale and purchase agreement — Loan agreement — Whether plaintiff liable to the interest chargeable for loan before issuance of certificate of fitness of occupation — Whether first defendant has given personal undertaking — temporary certificate of fitness of occupation qualify as certificate of fitness of occupation as intended by parties

The plaintiff entered into the sale and purchase agreements with Spring Crest (M) Sdn Bhd (the vendor-cum-developer) and Dacing Emas Sdn Bhd (landowner) for the purchase of three units of factory and commercial premises. To finance the purchase, the plaintiff entered into a loan agreement with the second defendant. The plaintiff then obtained undertakings from the first defendant, as attorney of Spring Crest (M) Sdn Bhd and Dacing Emas Sdn Bhd, that both the latter entities shall pay all interests accrued from that said loan, before the certificates of fitness for the factories were issued. On 1 November 1996, the second defendant demanded from the plaintiff the payment of the loan monthly instalment as the temporary certificates of fitness of occupation had been issued. The plaintiff made certain payments, but stopped thereafter on its counsel's advice. The plaintiff then filed an originating summons (encl 1), seeking, inter alia, the declaratory orders that the monthly instalments of RM140,308.92 already paid to the second defendant be refunded, and that the plaintiff was not required to pay any monthly instalments thereafter to the second defendant until the issuance of the certificates of fitness. The first defendant filed an application to strike out the originating summon, which was allowed by the court. The first defendant's main argument was that, it was not liable, as it was merely an agent and had made such assertions for the benefit of its principal. The plaintiff appealed (encl 16). As to the second defendant, it argued that the originating summons was flawed for want of the relevant legal and factual particulars and thus it was caught by surprise. Parties agreed that the appeal (encl 16) and the originating summons (encl 1) were to be heard together. The issues before the court were: (i) was the plaintiff liable to the interest chargeable for the loan, before the issuance of the certificate of fitness of occupation;(ii) was there any undertaking made to the plaintiff by anyone, to pay the interest on its behalf prior to the issuance of the certificate of fitness of occupation; and (iii) does temporary certificate of fitness of occupation qualify as certificate of fitness of occupation as intended by the parties.

Held, dismissing the plaintiffs appeal with costs (encl 16) and allowing the declaration application (encl 1) with costs:

(1) The originating summons, though not clearly spelt out on the intitulment, had

alluded to s 41 of the Specific Relief Act 1950. The court was satisfied that it had pleaded sufficiently the particulars to support the relief sought. The two conditions precedent viz the plaintiffs claim to some property or entitlement to a legal character, in the light of the demand for the return of the sums already paid, as laid down in the documentation, certainly had satisfied the statutory prerequisites. Therefore, there was sufficient compliance with that aspect of the legal and procedural requirements. The second defendant could not be said to have been caught by surprise.(see paras 6, 8)

(2) On documentary evidence, the court was satisfied that the interest must be paid even before the certificates of fitness were issued (see para 15).

(3) The letters of undertaking of the first defendant were signed in the capacity of an attorney. This fact, coupled with the tripartite open involvement of the second defendant and the early acknowledgment by the plaintiff of the first defendant's status, supported that the undertaking emanating from latter was given on behalf of the developer/land owner. The undertaking was to have the interest paid by the developer/landowner prior to the issuance of the certificate of fitness, a responsibility which was outside the purview of the abovementioned agency authority (see para 18).

(4) It would be quite reasonable to expect at the time of the execution of the agreement, parties having in mind a certificate of fitness which was not temporary. Moreover, in the absence of language which denotes a contrary intention, hence presuming that parties had used the term 'certificate of fitness' as employed by the Selangor by-laws, merely adds weight to the view of the meaning of the phrase 'certificate of fitness' (see paras 27–28).

[Bahasa Malaysia summary

Plaintif memasuki perjanjian jualbeli dengan Spring Crest (M) Sdn Bhd (penjual-pemaju) dan Dacing Emas Sdn Bhd (tuan punya tanah) untuk membeli tiga unit kilang dan premis komersial. Untuk membiayai pembelian tersebut, plaintif memasuki satu perjanjian pinjaman dengan defendan kedua. Plaintif kemudiannya memperoleh akujanji dari defendan pertama sebagai wakil kepada Spring Crest (M) Sdn Bhd dan Dacing Emas Sdn Bhd, yang bahawa mereka akan membayar kesemua faedah yang terakru dari pinjaman tersebut, sebelum sijil layak menduduki untuk kilang tersebut dikeluarkan. Pada 1 November 1996, defendan kedua menuntut dari plaintif bayaran ansuran pinjaman tersebut kerana sijil layak menduduki sementara telah dikeluarkan. Plaintif telah membuat sedikit bayaran tetapi berhenti berbuat demikian apabila dinasihati oleh peguamnya. Plaintif kemudiannya memfailkan satu saman pemula (lampiran No 1), menuntut antara lain, perintah-perintah perisytiharan bahawa ansuran bulanan sebanyak RM140,308.92 yang telah dibayar oleh defendan kedua dipulangkan, dan bahawa plaintif tidak perlu membayar sebarang ansuran bulanan kepada defendan kedua sehinggalah sijil layak menduduki dikeluarkan. Defendan pertama memfailkan permohonan untuk mengetepikan saman pemula tersebut. Ia dibenarkan oleh mahkamah. Defendan pertama menghujahkan bahawa beliau tidak bertanggungjawab kerana beliau hanyalah merupakan seorang ejen dan telah membuat pernyataan itu bagi prinsipal. Plaintif merayu (lampiran16). Defendan kedua pula, menghujahkan bahawa saman

pemula itu cacat kerana tidak mengandungi butiran undang-undang dan fakta yang relevan dan oleh yang demikian beliau telah dikejutkan oleh tindakan tersebut. Pihak-pihak bersetuju yang rayuan tersebut (lampiran 16) dan saman pemula tersebut (lampiran 1) didengar bersama. Isu-isu di hadapan mahkamah adalah: (i) sama ada plaintif bertanggungjawab terhadap faedah yang dikenakan berhubung dengan pinjaman tersebut, sebelum sijil layak menduduki dikeluarkan; (ii) sama ada terdapat sebarang aku janji yang dibuat kepada plaintif oleh mana-mana pihak untuk membayar faedah bagi pihak dirinya sebelum sijil layak menduduki dikeluarkan; dan (iii) sama ada sijil layak menduduki sementara sama memadai seperti sijil layak menduduki sebagaimana yang diniatkan oleh pihak-pihak.

Diputuskan, menolak rayuan plaintif dengan kos (lampiran 16) dan membenarkan permohonan perisytiharan (lampiran 1) dengan kos:

(1) Saman pemula tersebut, tidak secara jelas membuat intitulment, telah merujuk kepada s 41 Akta 1950. Mahkamah berpuas hati bahawa ia telah memplid secukupnya butiran-butiran untuk menyokong permohonannya. Dua pra-syarat iaitu plaintif menuntut hak ke atas hartanah atau hak dari segi undang-undang alam bentuk pemulangan semula wang yang telah dibayar sebagaimana yang dinyatakan di dalam dokumen, sudah tentunya memenuhi syarat-syarat berkanun itu. Oleh yang demikian, terdapat kepatuhan yang mencukupi dari segi undang-undang dan prosedur. Defendan kedua tidak dikatakan telah diperanjatkan (lihat perenggan 6, 8).

(2) Pada keterangan dokumentari, mahkamah berpuas hati yang faedah mesti dibayar walaupun sijil layak menduduki belum dikeluarkan (lihat perenggan 15).

(3) Surat-surat aku janji defendan pertama ditandatangani dalam kapasitinya sebagai seorang wakil. Fakta ini bersama dengan penglibatan tiga pihak yang terbuka dengan defendan kedua dan pengakuan plaintif berhubung dengan status defendan pertama, menyokong yang aku janji tersebut dikeluarkan bagi pihak pemaju/tuan punya tanah. Aku janji tersebut adalah pemaju/tuan tanah akan membayar faedah sebelum sijil layak menduduki dikeluarkan, merupakan satu tanggungjawab di luar bidang kuasa ejen (lihat perenggan 18).

(4) Ianya adalah munasabah untuk mengatakan yang pada masa perjanjian itu dimeteraikan, pihak-pihak berniat yang sijil layak menduduki bukannya berbentuk sementara. Tambahan pula, dengan ketiadaan bahasa-bahasa yang menunjukkan niat yang bertentangan, ianya boleh dianggap bahawa pihak-pihak telah menggunakan terma 'sijil layak menduduki' sebagaimana yang diguna pakai di dalam undang-undang kecil Selangor, ini hanya menguatkan lagi maksud ungkapan 'sijil layak menduduki' (lihat perenggan 27–28).]

Notes

For cases on construction of terms of contract, sale and purchase agreement, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2792–2799.

Cases referred to

Glaisdale in Schuler (L) AG v Wickman Machine Tool Sales Ltd [1974] AC 235 (refd)
Isyoda (M) Sdn Bhd v Low Seong Tek (t/a Seong Trading Co) [2000] 6 MLJ 454 (refd)
Lam Koh Sdn Bhd v Tadbir Tanah Johor Bahru; Plentong Granite Ind Sdn Bhd (Interveners) [2001] 7 CLJ 202 (refd)
Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors [1999] 3 MlJ 481 (refd)
London., Chatham and Dover Railway Company v South Eastern Railway Company (1893) AC 429 (refd)
Plantation Agencies Sdn Bhd v Haji Ariffin bin Haji Ismail [1978] 1 MLJ 219 (refd)
Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd [1997] 1 MLJ 409 (refd)
Saraswathy Devi a/p Nadchatiram v Vijayalakshimi Devi a/p Nadchatiram [1998] 1 MLJ 89 (refd)
Schuler (L) AG v Wickman Machine Tool Sales Ltd (1974) AC 235 (refd)
Smith v Lucas (1881) 18 Ch D 531 (refd)

Legislation referred to

Contracts Act 1950 s 183
Rules of the High Court 1980 O 7 r 3(1)
Specific Relief Act 1950 s 41
Street, Drainage and Building Act 1974
Uniform Building By-Laws 1986

Vishny Kumar (Ashekin Norman Fernandez & Associates) for the plaintiff/appellant in encl 16.
Joyce Uma (Cheang & Ariff) for the first defendant/respondent in encl 16.
Andrew Chiew (CB Loh with him) (Lee Hishammuddin Allen & Gledhill) for the second defendant.

Suriyadi J:

[1] Vide encl 1, which was an originating summons, the plaintiff had sought two orders of declaration, viz:

(i) that it was not to pay the installment payments to the second defendant until the certificate of fitness of occupation was issued by the relevant authority, with the consequential effect being that the prematurely paid installments grossing RM140,308.92 made up of the principal sum and interest be refunded; and

(ii) that the first defendant do pay to the second defendant the interest for the loan pursuant to its undertaking to pay, until the issuance of the certificate of fitness of occupation.

[2] Being heard simultaneously with the above encl 1, was an appeal by the plaintiff (encl 15) against the decision of the learned senior assistant registrar, in allowing the first defendant's application to strike out the originating summons and claim against it on 8 January 2001. As this appeal was quite similar in effect with the second declaration application parties had agreed to have encll 1 and 15 heard together.

A **[3]** In order to finance the purchase of the three units of factory premises, the plaintiff had applied for a loan of RM4,466,900.00 ('loan') from the second defendant. On 8 May 1995, the second defendant, by way of a letter dated 8 May 1995 ('VS-4' of the plaintiffs affidavit), had informed the plaintiff that its application for the loan had been approved, subject to certain terms and conditions. Thereafter on 27 May 1995, the plaintiff and the second defendant executed the relevant loan agreements ('VS-5A', 'VS5B' and 'VS-5C' of the plaintiffs affidavit).

[4] On 26 May 1995, the plaintiff had obtained undertakings from the first defendant, as attorney of Spring Crest (M) Sdn Bhd and Dacing Emas Sdn Bhd, that both the latter entities shall pay all interests accrued from that said loan, before the certificates of fitness for the factories were issued (exhs 'VS-F, 'VS-2B' and 'VS-2C' of the plaintiffs affidavit). On 1 November 1996, the second defendant demanded the monthly installment payment of the loan vide a letter of demand dated 27 September 1996 (please refer to exh 'VS-8' of the plaintiffs affidavit) as the temporary certificates of fitness of occupation had been issued.

[5] As a result of that letter of demand, the plaintiff made certain payments, but stopped thereafter on counsel's advice. Thereafter the plaintiff filed the abovementioned originating summons on 5 December 1997 (encl 1), seeking, inter alia, the said declaratory orders in particular that the monthly installments to the tune of RM140,308.92 already paid to the 2nd defendant be refunded within 30 days from the date of the order, and that the plaintiff be not required to pay any monthly installments thereafter to the second defendant until the certificates of fitness were issued. A scrutiny of the pleadings will highlight that neither the developer nor the proprietor was litigated by the plaintiff. The focus of the action connected to the undertaking was the first defendant rather than the latter two. The reason, according to the plaintiff, in a gist was that the undertaking of none payment of interest prior to the issuance of the certificates of fitness were given by the first defendant rather than the developer or the proprietor. The first defendant, as supported by the second defendant, ventilated that it was not liable, as it was an agent and had made such assertions for the benefit of its principal.

[6] The second defendant had shot its first salvo by asserting that the whole application was flawed, with the relevant legal and factual particulars very much wanting, and hence was caught by surprise. A cursory perusal will reveal that the action, though not clearly spelt out on the intitulment, had alluded to s 41 of the Specific Relief Act 1950, with this relevant substantive statute providing that:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief.
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> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[7] As regards the procedure to the current action, O 7 r 3(1) of the Rules of the High Court 1980 provides the following:

Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or as the case may be, a concise statement of the relief remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy'

[8] In the present case, I was satisfied that the originating summons in encl 1 had pleaded sufficiently the particulars to support the relief sought. The two conditions precedent viz the plaintiffs claim to some property or entitlement to a legal character, in the light of the demand for the return of the sums already paid, as laid down in the documentation, certainly had satisfied the statutory prerequisites. That being so there was sufficient compliance with that aspect of the legal and procedural requirements (*Saraswathy Devi a/p Nadchatiram v Vijayalakshimi Devi a/p Nadchatiram* [1998] 1 MLJ 89; *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors* [1999] 3 MlJ 481; *Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409; *Isyoda (M) Sdn Bhd v Low Seong Tek (t/a Seong Trading Co)* [2000] 6 MLJ 454; *Lam Koh Sdn Bhd v Tadbir Tanah Johor Bahru; Plentong Granite Ind Sdn Bhd (Interveners)* [2001] 7 CLJ 202). I was also not persuaded by the argument that the second defendant had been caught by surprise.

[9] I now return to the mainstream sticky problem fiercely contested before me. To appreciate the matter at hand, ie the purchase of the three units of factory and commercial premises, namely Lot SD 188, Lot SD 192, and Lot SD 193 fully, and the problems that emanate therefrom, it is quite useful if I were to reproduce some extracts of letters and agreements that were scrutinized by me. I start off with the following obvious sale and purchase agreement between Spring Crest, Dacing Emas and the plaintiff. The relevant portion of the agreement reads:

THIS AGREEMENT is made the 6th day of January 1995 between SPRING CREST (M) SDN BHD, a company incorporated in Malaysia and having its address at c/o MBf Property Services Sdn Bhd, 8th Floor, Plaza MBf, Jalan Ampang, 50450 Kuala Lumpur (hereinafter called 'the Vendor') of the first part and DACING EMAS SDN BHD, a company incorporated in Malaysia and presently having its registered address at 39, Jalan Yap Kwan Seng, 50450 Kuala Lumpur (hereinafter called 'the Owner') of the second part And the person whose name description and address are set out in Part 1 of the First Schedule hereto (hereinafter called 'the Purchaser') of the third part.

WHEREAS:

(a) The Owner is the registered and/or beneficial proprietor of all those pieces of lands held under HS(D) 27094 to 27100 (both inclusive) for PT No 1 to No 7 (both inclusive) respectively, all in the Mukim of Petaling, Daerah Petaling and State of Selangor (hereinafter referred to as 'the said Lands').

(b) By an agreement dated 22 July 1992 (hereinafter called 'the Joint Venture /Agreement') made between the owner and the vendor, the Owner has granted to the vendor the right to undertake the overall development of the said Lands upon the terms and the conditions contained therein.

(c) The vendor is developing the said Lands or part thereof into an industrial estate and is constructing thereon factories and commercial premises.

(d) The said Lands are presently charged to MBf Finance- Berhad with its registered address at 2nd Floor, Plaza Jalan Ampang, 50450 Kuala Lumpur as security for loans and financing facilities granted to the vendor.

(e) The vendor has agreed to sell and the purchaser has agreed to purchase all that plot of land forming part of the said lands with vacant possession and more particularly set out in Part 2 of the First Schedule which is delineated, and, [shaded red in the layout plan (hereinafter referred to as 'the said Lot') together with a one and a half (1 1/2) storey factory constructed or to be constructed thereon which is more properly described in Part 3 of the First Schedule hereto (hereinafter referred to as 'the said Building') (which said Lot and Building shall hereinafter collectively be referred as 'the said Property') subject to the terms and conditions hereinafter contained...

17.1 Upon the issuance of a certificate by the vendor's architect certifying that the construction of the said property has been practically completed in accordance thereof and provided that the purchaser shall have paid all monies payable under this agreement and shall have observed and performed the terms and covenants on his part herein contained, the aendor shall permit the purchaser possession of the said property PROVIDED THAT such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said property until such time a certificate of fitness for occupation of the said building is issued.

[10] As stated above, to finance the purchases the plaintiff had applied for a loan from the second defendant, of which application was approved on 8 May 1995, conditional, inter alia:

(i) of an undertaking by the developer M/S Spring Crest (M) Sdn Bhd, to complete the building, to obtain the individual title and the certificate of fitness, to obtain consent to transfer and charge from relevant authorities if necessary and to refund in the event of non-compliance;

(ii) that interest on the loan shall be payable monthly until the issuance of the certificate of fitness for occupation. Upon issuance of the certificate of fitness, repayment will be by 360 equal monthly installments of principal and interest of RM15,058.05, the first installment to be made on the first day of the month following next after the date of issuance of certificate of fitness for occupation;

(iii) the plaintiff consents to and authorize MBf Finance Berhad to disclose information to the developer pertaining to the mortgage loan account, until the issuance of certificate of fitness of occupation; and

(iv) monthly debit statements for interest due will be sent to the plaintiff though the official receipts for the interest payment made by the developer will not be issued to it.

[11] On 27 May 1995, the second defendant and the plaintiff executed a proper loan agreement which covered the earlier offer and prerequisites, inter alia:

'(2.02) At the request of the Borrower, the Lender has agreed to make available to the Borrower the loan upon the terms and subject to the conditions hereinafter contained.

...

(4.01) The Lender, relying upon each of the representations, and warranties set out in Section 3.01 hereof, hereby agrees with the Borrower to make available the Loan to the Borrower and permit Drawings thereon upon the terms and conditions hereinafter appearing.

...

(6.01) The Borrower covenants and agrees that until commencement of the repayment of the Loan as provided in Section 7.01 the Borrower shall without notice from the Lender pay interest at the prescribed Rate to the Lender on such amount of the Loan as might have been disbursed on each Interest Payment Date and mutatis mutandis upon full disbursement of the Loan.

(a) The interest chargeable on any sum advanced or paid to or on behalf of or otherwise howsoever payable by the Borrower to the Lender under this Agreement from the date on which the same shall have been advanced or paid until the full amount of the loan shall have been advanced, or paid to or on behalf of or for the benefit of the borrower shall be calculated on the daily balance of the Borrower's account at the end of every Interest period.

Without prejudice to Section 11.02, the Loan so far as not otherwise repaid or discharged under the provisions of this Agreement shall be repaid by the Borrower on demand by the Lender and until such demand is made, the Borrower shall repay the Loan with interest thereon at the Prescribed Rate by the Installments timeously on each of the Installment Payment Dates without notice from the lender such that the Indebtedness of the borrower shall have been fully discharged latest on the expiry of the Term.

...

(1.01) (Definition) Instalment Payment Dates:

... each of the dates on which an Installment is due from the Borrower. The first (1st) Instalment is due on the first day of the month (or such other date as the lender may specify) following the date of issuance of Certificate of Fitness in respect of the property and thereafter on the expiry of every successive monthly interval...

[12] I would like to put the matter in perspective, by stating that the whole matter heard before me was put to rest, by the answers to the following questions, namely:

(a) was the plaintiff liable to the interest chargeable for the loan, before the issuance of the certificate of fitness of occupation;

(b) was there any undertaking made to the plaintiff by anyone, to pay the interest on its behalf prior to the issuance of the certificate of fitness of occupation; and

(c) does temporary certificate of fitness of occupation qualify as certificate of fitness of occupation as intended by the parties?

[13] Needless to say, at common law no interest can be recovered unless there is some contractual or statutory right to it. A further step is required, whereby a contract which provides for the payment of money falling due, must specify the date or event upon which interest will become payable, and in the absence of such condition, the court will look at the circumstances of the case and perhaps award interest (*London, Chatham and Dover Railway Company v South Eastern Railway Company* (1893) AC 429; KS Doss on *The Law on Interest*).

A **[14]** If the answer were in the positive here for the first question, then the plaintiff must pay the interest, regardless of any undertaking by anyone to pay on its behalf. It follows therefore that the second defendant would be entitled to the interest already paid and could retain it regardless of the answer to the third question. If the answer to the third question were that the impugned temporary certificate of fitness B of occupation fails to qualify as 'certificate of fitness' as agreed in the loan document, the second defendant need only refund the principal sum from the prematurely paid installment payments. The eventual effect would be that no installment payments need be forwarded by the plaintiff until the certificate of fitness was obtained.

C **[15]** After due perusal and appreciation of all the documents, it was my conclusion that the first question must be answered in the positive, in that interest must be paid even before the certificates of fitness were issued. This was crystal clear as the approval of 8 May 1995 demanded that 'interest on the loan shall be payable monthly until the issuance of the certificate of fitness for occupation.' Further, pursuant to the loan agreement executed on 27 May 1995, as provided for under section 6.01 the D 'the borrower covenants and agrees' to 'pay interest at the prescribed rate to the lender on such amount of the loan as might have been disbursed upon full disbursement of the loan'.

[16] Who paid the interest was of no concern to the second defendant, as reflected E in the loan agreement, which read... 'The interest chargeable on any sum advanced or paid to or on behalf of or otherwise howsoever payable'. What was pertinent was that interest was required to be paid at the date or time when payment was due. In fact a further perusal of the relevant documents disclosed that the second defendant knew the identity of the entity that would pay the interest. This was obvious, as per the documents, whereat the plaintiff had consented to the second F defendant to disclose information to the developer pertaining to the mortgage loan account, until the issuance of the certificate of fitness of occupation; and that the monthly debit statements for interest due would be sent to the plaintiff 'though the official receipts for the interest payment made by the developer would not be issued to it.'

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[17] The first defendant could not be taken to have given a personal undertaking, as it was conspicuously clear that it had signed the undertaking letter dated 26 May 1995 as an attorney for Spring Crest (M) Sdn, Bhd and Dacing Emas Sdn Bhd. As an attorney, and in essence having authority and powers to perform certain kinds of acts H on behalf of the principal, the first defendant thus was an agent of the donor developer (and the proprietor). With that status and by virtue of s 183 of the Contracts Act 1950, what with there being an absence of any contract to the contrary, that undertaking could not be enforced against the first defendant (*Plantation Agencies Sdn Bhd v Haji Ariffin bin Haji Ismail* [1978] 1 MLJ 219).

I **[18]** To wind up the issue, with the letters of the first defendant being signed in the capacity of an attorney, coupled with the tripartite open involvement of the second defendant and the early acknowledgment by the plaintiff of the first defendant's status it was obvious that an undertaking emanating from latter was given on behalf of the developer/land owner. The undertaking was to have the interest paid by the

developer/landowner prior to the issuance of the certificate of fitness, a responsibility which was outside the purview of the abovementioned agency authority.

[19] As regards the third question, it was documented satisfactorily that the loan was to be repaid with interest, on each of the installment payment dates, without notice from the lender, until it was fully discharged. Under section 1.01 installment payment dates was defined as each of the dates on which an installment was due from the borrower, with the first installment being due on the first day of the month (or such other date as the lender may specify) 'following the date of issuance of certificate of fitness in respect of the property and thereafter on the expiry of every successive monthly interval'

[20] I now will discuss the issue of whether parties here intended that a certificate of fitness of occupation would include a temporary certificate of fitness or not. The inescapable reality is that the actual intention of parties pertaining to the contract must be that of the intention at the time when the contract was struck i.e. in 1995, and not when the suit was filed. Apart from the reasonableness of that conclusion there was also absence of any provision stating otherwise.

[21] The routine easy route of seeking assistance by zeroing onto an exhibit tendered by any of the interested party, which could resolve the above intention speedily in the like of clarification, correct definition etc. failed to materialize as the want of details was obvious. So, how do I ascertain the intention of the parties in such difficult circumstances? It is trite that when construing contracts the intention of the parties is the meaning of the words they have used then. Lord Simon of *Glaisdale in Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 had reiterated that the question to be answered always was, what the meaning was of what the parties had said rather than what the parties meant to say. In a word intention is equivalent to 'meaning' (*The Interpretation of Contracts* by Kim Lewison). At the end of the day a court must consider the meaning of the words used and not guess what the intention was of the parties (*Smith v Lucas* (1881) 18 ChD 531).

[22] As there was a dearth of clarity in the agreement, for purposes of ascertaining the parties' intention, I thus had to seek assistance from past practices of court, when faced with similar like situation. When faced with a problem of construction, in the like of the current issue, courts will adopt an objective test approach i.e. the reasonable man's test. Further and if necessary, in addition to adverting to the fine prints printed in the instrument agreed by parties, business common sense may not be discounted either.

[23] With very little resources before me, I began by sourcing the relevant statute meant for the State of Selangor, ie the Street, Drainage and Building Act 1974 (Act 133), Selangor Uniform Building By-Laws 1986. A perusal of this statute highlighted that there were different provisions for the requirement of certificate of fitness for occupation (s 25), temporary certificate of fitness for occupation (s 26), and partial certificate of fitness for occupation.

A **[24]** From the aspect of drafting or construction of the words, every word must bear some meaning and every separation of provision must have a purpose. Parliament does not legislate in vain meaningless words and phrases, let alone legislate in a certain manner in the like of providing distinct sections for different types of certificates of occupation (Krishnadas a/l Achutan Nair & Ors v Maniyam
B a/1 Samykano (1997) 1 MLJ 94; see also Uniform Building By-Laws 1984 (GN 5178/85).

[25] This course of action that I have undertaken is not without precedent, as in
C MBF Property Services Sdn Bhd & Anor v Balasubramaniam a/1 K Arumugam (2000) 2 MLJ 267, the Court of Appeal had endorsed the allusion to the Building (Federal Territory of Kuala Lumpur) By-Laws 1984 when faced with similar problems. This by-law which is for Wilayah Persekutuan Kuala Lumpur is quite similar to Act 133 (above). The Court of Appeal there had clearly stated:

D > Now it is quite clear that the undated letter of the first appellant provides no definition of the expression 'certificate of fitness'. It merely uses that term. The learned judge relied on the Building (Federal Territory of Kuala Lumpur) By-Laws 1984 as an aid to interpret the meaning of that phrase. 'Certificate of fitness' under the by-laws means a certificate which would entitle the respondent to occupy the subject property.
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E > We are unable to disagree with the reasoning of the learned Judge. In the absence of language which denotes the presence of a contrary intention, it may be presumed that parties used the term 'Certificate of fitness' as employed by the by-laws. Once this conclusion is reached, no fault may be placed upon the reasoning adopted by the learned judge. She merely construed the meaning according to well-settled canons of construction (see, for example Nourse LJ in IDC Group Ltd v Clark [1992] 2 EGLR 184 IDC Group Ltd v Clark [1992J 2EGLR184). She did not commit any error. We are unanimous in our
F > agreement with her judgment.
>
> We would therefore dismiss the appeal.

G **[26]** In terms of construction of a contract where the words are clear, and in the absence of a claim for rectification, the court must give effect to them even if they have no discernible commercial purpose. In a gist, the commercial purpose even if perceived to exist, cannot override the words of a contract where they are clear. But dvertence may be permitted to the usage of that commercial purpose as an aid of construction in the case of a badly drawn contract ((1986) 33 Build. LR 1).
H The way I see it the loan agreement here lacked exactitude hence the need to allude to its commercial purpose.

[27] With buying these factory premises indisputably a commercial transaction, a
I commercial solution to the current problem could not be discounted, resulting in the contractual words in the circumstances of the case being construed as far as possible, capable of giving effect to commercial good sense. To wind it up, alluding to business common sense, no expectant house owner or factory premises purchaser would be satisfied with a temporary certificate of fitness. To agree to a temporary certificate of fitness of occupation would mean witnessing the plaintiff acquiescing itself to the tender mercies of every conceivable unpredictable negative element associated with

anything temporary. Thus, it would be quite reasonable to expect at the time of the execution of the agreement, parties having in mind a certificate of fitness which was not temporary.

[28] The absence of language which denotes a contrary intention, hence presuming that parties had used the term 'certificate of fitness' as employed by the Selangor by-laws, merely adds weight to my view of the meaning of the phrase 'certificate of fitness'. It was after having considered all the above matters that I had dismissed the plaintiffs appeal with costs (encl 16), and allowed the declaration application (encl 1) with costs in the following manner:

(i) no installment payment is made by the plaintiff until the certificate of fitness is issued;

(ii) the installment comprising the principal be refunded to the plaintiff within 30 days;

(iii) the interest is not refunded to the plaintiff;

(iv) prayer (ii) of enclosure is dismissed with costs;

(v) costs against the second defendant as regards the matter of declaration between the plaintiff and the second defendant; and

(vi) the decision binds both cases.

Plaintiff's appeal dismissed with costs.